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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York, the highest court of that State, entered May 31, 1956, and upon remittitur filed, the judgment entered thereon in the Supreme Court, New York County, on June 8, 1956.

Opinions Below

Court of Appeals of the State of New York, 1 N. Y. 2d, 342; *(Appendix 1, 11). Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 1 App. Div. 2d, 3; (Appendix 18, 32). Supreme Court of the State of New York, County of New York (after trial), 207 Misc. 291; id. 294; (Appendix 34, 37). Supreme Court of the State of New York, County of New York (upon preliminary motion to dismiss), 133 N. Y. S. 2d, 314 (not officially reported) (Appendix 53).

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

Questions for Review

1. Was full faith and credit denied the ex parte Nevada decree of divorce validly procured by petitioner against respondent, by the fact that New York Civil Practice Act, Sec. 1170-b, has been applied below to permit respondent, subsequent to such divorce: (a) to complete a one-year's jurisdictional domicile for the purpose of maintaining an ex parte separation action as a married woman against petitioner, a Nevada resident; and (b) to proceed to trial and to obtain a judgment of maintenance and counsel fees after the dismissal of her complaint for a separation adjudged to be barred by the divorce decree?

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* Appendix refers to A1 et seq. pages following this Brief.

2. Was Civil Practice Act, Sec. 1170-b, validly applied below so as to impose a new post-marital obligation upon a non-resident husband, which obligation never existed in California and Nevada, the sole States of the parties' joint matrimonial domicile, and which statute was not even enacted in New York at the time of their physical separation?

3. Is Civil Practice Act, Sec. 1170-b, discriminatory, and as applied below, has petitioner been denied equal protection of the laws by the fact that that statute actually (a) may only be applied against a husband who procures a decree of divorce in another State and not in New York; and (b) may not be applied in any New York separation action where the issue of divorce does not arise?

4. Was the petitioner denied due process of law by the following:

(a) Respondent being permitted to sequester petitioner's property upon inadequate constructive notice, where neither the summons nor the complaint commencing the action, nor the sequestration papers, in any way made any attack upon or even referred to the prior divorce decree, nor that any claim for maintenance would be made by respondent as a divorced woman.

(b) The determination of the Courts below that petitioner was guilty of such misconduct as to make it a requirement of justice that respondent be supported after divorce, although her complaint was dismissed at the close of her case by reason of the bar of the Nevada decree and petitioner never had a real opportunity to answer to those charges of misconduct.

(c) The fact that the basis for relief after divorce, under Civil Practice Act, Sec. 1170-b, rests solely upon the vague and indefinite phrase "as justice may require".

(d) The respondent being required falsely to claim she is a married woman and permitted to sue for a separation.

Constitutional and Statutory Provisions Involved

Article I, Section 10, which reads, in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ."

Article IV, Section 1, which reads, in part:

> "Full faith and credit shall be given in each State to the public acts, Records, and Judicial Proceedings of every other State."

Article IV, Section 2, which reads, in part:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, which reads, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act, Sections 1170-b, 1165-a(1-3), 1166, 1161 (Appendix 57).

Statement

This ex parte separation action was commenced by respondent as an alleged wife against the petitioner as the alleged husband. Defendant, appeared specially, and ob-

jected to the jurisdiction of the Court over his person and of the subject matter. After his preliminary motion to dismiss the action was denied, (Appendix 53) preserving his special appearance with the permission of the court, he answered the complaint and set up as a bar to the action, his jurisdictional objections and the ex parte decree of divorce previously procured by him against the plaintiff.

The parties were married in Connecticut in September 1948. Defendant then was domiciled in Nevada, and plaintiff then was domiciled in California. Each had been so domiciled for many years prior to the marriage. By virtue of the marriage, Nevada became the initial marital domicile of the parties, and a few months thereafter they established California as their subsequent marital domicile, which continued until their physical separation in September 1952. There is no issue of the marriage. When married, respondent was twenty-eight years of age and petitioner, fifty. She had previously been divorced once, and he, four times.

On October 1, 1952 the respondent, as plaintiff, commenced a prior separation action against petitioner, as defendant, in the Supreme Court, New York County, founded upon a complaint verified by her while still remaining in California, in which she falsely alleged the parties to be residents of New York. Plaintiff did not actually come to New York herself until December 1952, after the commencement of that prior action. She was only here a short while before returning to her domicile in California. The prior separation action was dismissed by final order of the Supreme Court, New York County, dated February 27, 1953, which adjudged that the parties were not residents of New York State as of October 1, 1952, and neither had ever resided in New York prior thereto continuously for one year (Appendix 72).

On February 12, 1953, the wife again came to New York, and allegedly has resided there ever since. Thereafter, in March 1953, the husband changed his domicile from California back to Nevada. He then procured a final ex parte decree of divorce against the respondent in the State of Nevada on June 30, 1953. While said divorce action was pending, respondent made a motion in her first separation action (then pending on her appeal, subsequently dismissed) to enjoin petitioner from proceeding with his said divorce action, and said motion was denied by order of the Supreme Court below dated July 3, 1953.

Meanwhile, on April 13, 1953, there became effective New York Civil Practice Act, Sec. 1170-b. One year later, in April 1954, respondent commenced publication of the summons herein against defendant as a non-resident. Respondent had procured an ex parte order from the Supreme Court, New York County, on April 21, 1954, sequestrating petitioner's New York property. Neither said order, nor the papers upon which it was based, made any reference to the divorce.

Defendant's objections that the proceedings violated the Federal Constitution and denied him equal protection of the laws, due process of law, the privileges and immunities to which he is entitled, and failed to give full faith and credit to said Nevada decree, were made as follows: upon his preliminary motion to dismiss the action (Appendix 53); in his answer to the complaint (fols. 101-110); during the trial (fols. 134-150, 159-160, 171-174, 863-867, 1043-1046, 1188-1190, 1196-1199, 1351-1359, 1937); and in his counsel's briefs and arguments upon every appeal.

The first decision of the trial Court dismissed the complaint by reason of the Court having found the Nevada divorce decree to be valid and entitled to full faith and credit (Appendix 34). The second decision of the trial

Court held Civil Practice Act, Section 1170-b, not to violate the Federal Constitution and awarded respondent substantial maintenance and counsel fees (Appendix 37). Petitioner then appealed to the Appellate Division of the Supreme Court. That Court affirmed with an opinion sustaining the constitutionality of Section 1170-b, the Presiding Justice dissenting in a separate opinion (Appendix 18, 32). The petitioner further appealed to the Court of Appeals. That Court affirmed the order of the Appellate Division, with an opinion. Two Judges dissented in a separate opinion (Appendix 1, 11). Plaintiff, unsuccessfully, had cross-appealed from that part of the judgment below, which was unanimously affirmed, sustaining both the validity of defendant's Nevada divorce and his objection to the court's jurisdiction of his person.

Argument

The Courts below have created widespread concern in dogmatically applying herein certain persuasive utterances of this Court which we do not believe were intended to be so applied by this Court.

When this Court tightened the strings about husbands who fled the marital domicile in order to escape their domestic responsibilities through foreign ex parte divorce, we are confident that it did not intend to loose upon the country predatory females who themselves, with perfect complacency, might abandon the marital domicile, and when separated from or divorced by their husbands, then comb the legislative counters of forty-eight States for the best bargain in support statutes.

Among the questions of law raised herein is perhaps a very controlling one as to whether by the prior decisions of this Court such as *Estin v. Estin*, 334 U. S. 541, it was

intended, as we believe, to lay down a rule that it is only when a wife has been vested with property rights by a prior support judgment of one State, that they may not subsequently be extinguished by ex parte divorce decree obtained by the husband in another State.

A minority of this Court rendering a separate opinion in *Armstrong* v. *Armstrong*, 350 U. S. 568, ; 100 L. ed. (Advance p. 465) indicated that it was not in accord with the point we make. In that case, the minority seemed to be considerably influenced by the thought that alimony is a vested property interest even before it has been awarded to a wife. This is not the law of Nevada or California, the only two States where the parties dwelled together as husband and wife. Nor is it the rule in New York, where the wife came after the physical separation of the parties[1]. (Except as it may have been qualified by the procedural enactment of Sec. 1170-b so as to apply solely in cases where a divorce is had and sustained as valid). Alimony has long been defined in New York as the transformation by judicial decree, of a general *duty* of support, into a legal *debt*[2]. It is an incident of the relationship which ordinarily terminates with the death of the husband[3].

The expectancy of alimony after the death of a marriage is no more a property right than the hope of inheritance from the estate of living next-of-kin. The right to receive support does not ripen into a vested obligation until fixed by an event in the law. (See, opinions below, A-6, 11-12, 15-16.)

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(1) *Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439); *Lynn* v. *Lynn*, 302 N. Y. 193, 203 (cert. den. 342 U. S. 829); *Cardinale* v. *Cardinale*, 8 Cal. 2d 762, 68 P. 2d, 351; *Calhoun* v. *Calhoun*, 70 C. A. 2d 233, 160 P. 2d, 923.

(2) *Romaine* v. *Chauncey*, 129 N. Y. 566, 570; *Turner* v. *Woolworth* 221 N. Y. 425, 428-429.

(3) *Wilson* v. *Hinman*, 182 N. Y. 408.

New York, California and Nevada are not States where a non-statutory equity action for support of a wife may be maintained. No action for a separate maintenance only, may be brought in New York[4]. If this separation action had been dismissed for any reason other than the bar of the Nevada decree, then no alimony could be awarded the wife because Sec. 1170-b, does not apply in such an instance and no rights otherwise were vested in her under the New York support laws[5].

We believe the majority below was overly enthusiastic in interpreting *Armstrong* v. *Armstrong*, supra; that there, ". . . all the justices seemed to have agreed that a state may validly grant alimony after and in spite of a foreign ex. parte divorce." We have carefully examined the *Armstrong* opinion. With all due respect to the Court below, we fail to detect therein anything which seems to indicate that conclusion. This Court appears to have affirmed in the *Armstrong* case because in granting the decree of divorce the Florida Court did not finally foreclose the wife from a future award of alimony.

As far as we are aware, the principle enunciated by this Court in *Thompson* v. *Thompson*, (1913) 226 U. S. 551, 566-567, still is good law. For, as did the *ex parte* final Virginia divorce decree in that case, so does the Nevada decree at bar, finally cut off any right in the wife to receive alimony. (Appendix 71). The *Thompson* case was referred to by this court and not disapproved, in *Estin* v. *Estin*, 334 U. S. 541, at p. 547.

We do not believe that the marital laws of the sole places where the parties dwelled together as husband and wife no longer have any effect and that merely by changing her

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(4) *Ramsden* v. *Ramsden*, 91 N. Y. 281; *Johnson* v. *Johnson*, 206 N. Y. 561.

(5) *Ross* v. *Ross*, 290 N. Y. 887; *Querze* v. *Querze*, id. 13, 18; *Weintraub* v. *Weintraub*, 302 N. Y. 104, 108.

place of abode a wife may revolutionize the marriage obligation as understood when contracted by both parties; nor that the former wife may now seek out a better place in a State where post-marital maintenance prevails, and unilaterally establish new rights for herself.

While it is now an accepted fact that either spouse may export his or her marital status to another State, it does not follow that either one may then inject into the status a new obligation which had not existed at the point of departure. It seems to us to be intrinsically wrong to hold that the State which the parties have adopted as their marital abode, subjecting themselves to the domestic way of life ordained by that community, may only grant the husband a license to remarry and that it has no power to abridge the inchoate interests of the wife in the marriage upon her subsequent departure.

Nevada was the husband's domicile at the time of the marriage and *ipso facto* it became the domicile of the wife[6]. The law of domicile at the time of the marriage regulates the construction of the marriage contract.[7] If freedom from obligation to pay alimony upon divorce was inherent in the marriage relation as contracted by these parties and unchanged until the time of their physical separation, then how could New York validly impose a new post-marital obligation upon a non-resident to support his former wife?

By the dismissal of the wife's first action, New York proclaimed it had no interest in her alleged matrimonial grievances, for jurisdictional reasons at least. Then, New York conveniently synthesized jurisdictional interest. It permitted the former wife, after having been divorced, to complete jurisdictional requirements of residence for

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(6) *Matter of Daggett*, 255 N. Y. 243, 246; *Gray* v. *Gray*, 143 N. Y. 354, 359.

(7) *Cunningham* v. *Cunningham*, 206 N. Y. 341.

one year, in order to maintain an action for separation based upon the fictitious allegations that she is a married woman and resident in New York. The Nevada decree was entitled to full faith and credit at all times since its rendition, not just some of the time.[8]

It will be noted that Civil Practice Act, Sections 1165-a(3) and 1166 which were enacted long before Section 1170-b had any incipiency, relate to the right of a married woman (and not a divorced woman) to establish a residence for the purposes of commencing a separation action. Civil Practice Act, Sec. 1161, specifying the grounds upon which an action for separation may be brought, expressly states: "An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, . . ."

The existence of the marriage relation is an essential element of an action for a separation.[9] We believe that **Civil Practice Act, Section 1170-b, denied Mr. Vanderbilt due process and equal protection of the laws, when construed below to permit his former wife to maintain a separation action in the false guise of a married woman after she had been divorced.**

Petitioner was denied the equal protection of the laws, since no New York wife is permitted to maintain an action for a separation once she has been divorced in New York. She may not even receive support there in a separation action (not involving a prior divorce) which has been dismissed.[10]

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(8) *Davis* v. *Davis*, 305 U. S. 32, 40.

(9) *Bannon* v. *Bannon*, 270 N. Y. 484, 488; *Fischer* v. *Fischer*, 254 N. Y. 463.

(10) *Ross* v. *Ross*, *supra*, 290 N. Y. 887.

Although proclaiming innocence, the New York Legislature actually tailor-made Sec. 1170-b to fit a foreign divorce by expressly providing that, if the reason for the dismissal is the prior divorce judgment, then alimony may follow. If Mr. Vanderbilt had not divorced his wife and her action had been dismissed for any other reason, she could not be awarded alimony. A New York judgment of divorce would be conclusive and not amenable to a subsequent separation suit founded upon a false allegation of an existing marriage. The prior judgment would not be subject to collateral attack.[11] The statute is in reality the instrument of prejudice against foreign ex parte divorces foreseen by Mr. Justice FRANKFURTER and Mr. Justice JACKSON in *Estin* v. *Estin*, supra, at pages 552, 554.

There is nothing in the process commencing this action which even hints that the wife was seeking to strike down the husband's Nevada decree as invalid and that if she failed she would seek maintenance as a divorced woman under Sec. 1170-b. It is well established that when seeking to tear down the presumptive validity of an ex parte divorce decree of another State the former wife has a heavy burden of pleading and proving its invalidity.[12] But in this case Mrs. Vanderbilt was permitted to commence a separation action and to cause her former husband's property to be seized in New York, without making any pretense at pleading or claiming the Nevada decree to be invalid. Its presumptive effect was disregarded upon our preliminary motion to dismiss the action for lack of jurisdiction. However, the trial Court, even against the expressed reluctance of the wife's counsel to proceed with proof in an effort to undermine the jurisdictional validity of the Nevada decree, compelled him to do so. (fols. 1042, 1047-1055).

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(11) *Arcuri* v. *Arcuri*, 265 N. Y. 358.

(12) *Garvin* v. *Garvin*, 302 N. Y. 96, 102.

We should like to make one additional point on the due process question—that is, the severity with which the Appellate Courts below ruled that so long as the plaintiff testified as to defendant's alleged misconduct, that formed the proper basis for an award against him under the label "as justice may require". Full faith and credit also was denied the divorce decree when the intermediate Appellate Court below made findings of misconduct on defendant's part. This was done despite the fact that at the conclusion of plaintiff's case for a separation, the complaint was dismissed because of the finding of the validity of the Nevada domicile and the trial Court expressly stated only that it proceeded to take proof of the parties "finances, income, and plaintiff's needs". (Appendix 37—fols. 149-150, 181-186, 1331, 1334, 1346-1350).

The Court below disregarded the pronouncement of this Court in *Williams* v. *North Carolina*, 325 U. S. 226, 229, to the effect that the divorce judgment is conclusive on the merits as to everything but jurisdiction.

We do not understand why the Appellate Courts below insisted that defendant had had his full day in court when it is so clear from the record that by the dismissal of the separation complaint he was not required or permitted to meet the charges of misconduct and was refused instruction by the trial Court as to what charges he was required to meet under the banner "as justice may require". (fols. 1353-1370). The manner in which this subject was handled below, we believe, is completely obnoxious to an ordinary sense of fair play and equal justice. Equity has followed the woman and not the law.

Conclusion

WHEREFORE petitioner respectfully prays that a writ of certiorari issue as above requested.

Dated: August 6th, 1956.

Respectfully submitted,

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